Suajaya Mahir (Crop) Sdn Bhd v Tamar Plantation Sdn Bhd

HIGH COURT (SIBU) — SUIT NO 22–79 OF 2000
CLEMENT SKINNER J
25 OCTOBER 2000

Civil Procedure *— Injunction — Application for interlocutory injunction — Restraining trespass and use of land — Whether serious issues to be tried — Principle applicable*

Civil Procedure *— Injunction — Damages — Undertaking of damages — Whether the justice of the case calls for the grant of an injunction — Whether parties would be adequately compensated in damages*

The plaintiff and the defendant are adjoining landowners. Both of them are developing their respective lands for agricultural purposes. There is a public road ('the trunk road') in that area and the plaintiff's land lies in front of the defendant's land from the trunk road. In order for the defendant to get to the trunk road, it could use a former logging road constructed on State land ('the former logging road') which leads only to the boundary of the plaintiff's land, or pass through the plaintiff's land using a field road constructed by the plaintiff ('the field road'). In November 1999, the defendant spoke to the plaintiff on the usage of the former logging road and the field road to gain access to and from the defendant's land to the trunk road. The defendant thereafter started using the said roads for access to the defendant's land. On 29 December 1999, the plaintiff wrote to the defendant saying that it had not granted permission for use of its roads and prohibited the use of the same. On 31 December 1999, a meeting took place between the representatives of the plaintiff and the defendant and some form of compensation to the plaintiff were proposed. Unfortunately, the commercial terms upon which the two roads were to be used could not be agreed upon. By a letter dated 3 May 2000, the plaintiff revoked all previous offers made to the defendant. On 3 May 2000, the defendant referred its problem of access to the superintendent of lands and surveys, Sibu ('the Superintendent'). On 10 May 2000, the plaintiff informed the defendant that the defendant were permitted to use the said roads for a limited period of 30 days on certain conditions. On 11 May 2000, the plaintiff wrote to the defendant informing them, inter alia, of damage caused to the plaintiff's roads and young oil palm trees. At the end of May 2000, the plaintiff put up a guardhouse on its land but this was knocked down by the defendant. On 5 June 2000, the defendant wrote again to the director of the department of land and survey informing him of the problems faced by the defendant. Meanwhile, when the grace period of 30 days expired on 12 June 2000, the plaintiff put up a metal pole barrier across the road, which was bulldozed through by the defendant, but which was immediately replaced by the plaintiff. On

15 June 2000, the defendant constructed a diversion around the plaintiff's guardhouse and metal pole barrier and have since used that diversion to get onto the former logging road and field road. Further negotiations were made but did not fall through especially with regards to the field road. The defendant wrote again to the superintendent on 7 September 2000 and the superintendent by a letter dated 26 September 2000 informed the defendant that the matter was receiving his attention. Meanwhile, on 18 September 2000, the plaintiff filed an action against the defendant and an application for an interlocutory injunction against the defendant's use of the field road. The issue for determination is whether an injunction should be granted in the plaintiff's favour.

Held, dismissing the application:

(1) The plaintiff's allegation that the defendant is a trespasser is not frivolous or a vexatious one as alleged by the defendant. The question whether the defendant is to be regarded as a trespasser raises bona fide serious issues that require to be tried. Another matter upon which a serious question has arisen is whether the field road is the only reasonable access for the defendant to the trunk road, which is essentially a question of fact which is unsuitable for determination here because the evidence before the court at this stage of the proceedings is incomplete and given on affidavit and untested by cross-examination (see pp 491B–C, 492B–C).

(2) However, the justice of the case does not call for the grant of an injunction as the defendant would not be adequately compensated in damages for the loss it would have sustained by being prevented from using the field road between now and the trial because any disruption to the defendant's present activities, schedule and time-table would cause irreparable damage. On the other hand, if the injunction was refused, what the plaintiff suffers is the physical damage complained ofto its property which can be compensated indamages; but the business activities of the plainitff's land is not hindered and would continue unbated. Thus, the harm that the injunction would produce by its grant far outweighs the harm that would result from its refusal (see pp 493H–I, 494E-F).

(3) As the defendant had written to the superintendent, it would accordingly be inappropriate to grant an injunction while the matter is still under consideration by the superintendent as it may result in a situation where the superintendent decides to issue a right of way certificate but the defendant is prevented from using such right of way because of the injunction granted by this court (see pp 495I–496A).

[Bahasa Malaysia summary

Plaintif dan defendan merupakan tuanpunya yang bersebelahan. Kedua-duanya memajukan tanah mereka masing-masing untuk tujuan pertanian. Terdapat sebatang jalan awam ('jalan raya utama') di kawasan itu dan tanah plaintif terletak di hadapan tanah defendan dari arah jalan raya utama. Untuk membolehkan defendan melalui jalan raya utama, ia boleh menggunakan sebatang bekas jalan pembalakan yang dibina atas tanah Negeri ('bekas jalan pembalakan') yang menuju ke garis sempadan tanah plaintif, atau melalui tanah plaintif dengan menggunakan sebatang jalan padang yang dibina oleh plaintif ('jalan padang'). Pada bulan November 1999, defendan telah bercakap dengan plaintif mengenai penggunaan bekas jalan pembalakan dan jalan padang untuk keluar-masuk tanah defendan ke jalan raya utama. Selepas itu, defendan mula menggunakan jalan-jalan tersebut untuk memasuki tanah defendan. Pada 29 Disember 1999, plaintif menulis kepada defendan mengatakan bahawa ia tidak memberikan kebenaran untuk penggunaan jalan-jalannya dan melarang penggunaan jalan-jalan tersebut. Pada 31 Disember 1999, suatu mesyuarat telah diadakan di antara wakil-wakil plaintif dan defendan. Pampasan untuk plaintif telah dicadangkan. Malangnya, syarat-syarat komersil yang menjadi asas atas mana kedua-dua jalan harus digunakan tidak dapat dipersetujui. Menerusi sepucuk surat bertarikh 3 Mei 2000, plaintif membatalkan kesemua tawaran yang dibuat kepada defendan. Pada 3 Mei 2000, defendan merujuk masalah keluar-masuk kepada penguasa tanah dan tinjauan, Sibu ('penguasa tersebut'). Pada 10 Mei 2000, plaintif memaklumkan kepada defendan bahawa defendan dibenarkan mengguna jalan-jalan tersebut untuk satu tempoh had masa selama 30 hari dengan syarat tertentu. Pada 11 Mei 2000, plaintif menulis kepada defendan dengan memberitahu mereka, antara lain, tentang kerosakan kepada jalan dan pokok-pokok kelapa sawit muda kepunyaan plaintif. Pada hujung bulan Mei 2000, plaintif mendirikan sebuah rumah pengawal atas tanahnya tetapi ini telah diruntuhkan oleh defendan. Pada 5 Jun 2000, defendan sekali lagi menulis kepada pengarah jabatan tanah dan tinjauan memaklumkan masalah-masalah yang dihadapi olehnya. Sementara itu, apabila tempoh lanjutan selama 30 hari luput pada 12 Jun 2000, plaintif telah mendirikan satu halangan tiang besi merentasi jalan itu, yang diratakan oleh defendan, tetapi ia digantikan serta merta oleh plaintif. Pada 15 Jun 2000, defendan mendirikan suatu lencongan di sekeliling rumah pengawal plaintif dan halangan tiang besi dan sejak itu telah menggunakan lencongan itu untuk melalui bekas jalan pembalakan dan jalan padang. Perundingan lanjut dibuat tetapi ini tidak berjaya terutamanya berkenaan dengan jalan padang. Defendan menulis sekali lagi kepada penguasa tersebut pada 7 September 2000 dan penguasa menerusi sepucuk surat bertarikh 26 September 2000 memaklumkan kepada defendan bahawa perkara tersebut sedang menerima perhatian beliau. Sementara itu, pada 18 September 2000, plaintif memfailkan satu tindakan terhadap

defendan dan satu permohonan untuk injunksi sementara terhadap penggunaan tanah padang oleh defendan. Isu untuk ditentukan adalah sama ada suatu injunksi harus diberikan memihak kepada plaintif.

Diputuskan, menolak permohonan tersebut:

(1) Tohmahan plaintif bahawa defendan adalah merupakan penceroboh bukanlah sesuatu yang tidak bersungguh-sungguh atau menyusahkan sebagaimana yang dikatakan oleh defendan. Persoalan sama ada defendan haruslah dianggap sebagai penceroboh menimbulkan isu-isu serius bona fide yang perlu dibicarakan. Satu lagi perkara di mana soalan serius telah timbul adalah sama jalan padang merupakan satu-satunya jalan masuk yang munasabah untuk defendan ke jalan raya utama, yang pada dasarnya merupakan satu persoalan fakta yang tidak sesuai untuk penentuan di sini kerana keterangan di hadapan mahkamah di tahap prosiding ini tidak sempurna dan diberikan atas afidavit serta tidak tertakluk kepada pemeriksaan balas (lihat ms 491B–C, 492B–C).

(2) Namun demikian, keadilan kes tidak mewajarkan pemberian apa-apa injunksi memandangkan defendan tidak akan menerima pampasan yang memadai untuk kerugian yang harus ditanggungnya sekiranya dilarang daripada menggunakan jalan padang buat masa ini sehingga perbicaraan kerana sebarang gangguan kepada kegiatan dan jadual defendan akan menyebabkan kerugian yang tidak dapat dipulihkan. Sebaliknya, sekiranya injunksi tersebut ditolak, apa yang ditanggung oleh plaintif adalah kerosakan fizikal kepada hartanahnya yang boleh dipampaskan dengan ganti rugi; tetapi kegiatan perniagaan tanah plaintif tidak dihalangi dan akan diteruskan. Justeru itu, kerosakan yang bakal disebabkan oleh injunksi tersebut sekiranya diluluskan jauh melebihi kerosakan hasil daripada penolakannya (lihat ms 493H–I, 494E-F).

(3) Oleh kerana defendan telah menulis kepada penguasa tersebut, berikutnya ianya tidak wajar untuk memberikan suatu injunksi sementara perkara ini masih ditimbang oleh penguasa tersebut kerana ia mungkin menyebabkan keadaan di mana penguasa tersebut memutus untuk mengeluarkan sijil hak laluan tetapi defendan dihalang daripada menggunakan hak laluan tersebut disebabkan injunksi yang diberikan oleh mahkamah ini (lihat ms 495I–496A).]

Notes

For notes on injunction see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1927–2353.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Legislation referred to

Sarawak Land Code (Cap 81) ss 32, 32,(1)(h), 33, 34, 34(1), 34(2), 34(3), 34(4), 34(5), 34(6), 35, 36, 37, 132

Joseph Tang (*Tang & Co*) for the plaintiff.
Perpetua Phang (*Reddi & Co*) for the defendant.

Clement Skinner JC. : This is an application by the plaintiff for an interlocutory injunction to restrain the defendant, until further order or until the trial of this action, from crossing or trespassing onto the plaintiff's land.

The plaintiff and the defendant are adjoining landowners. Both own large parcels of land in the Balingian Land District. The parcel owned by the plaintiff measures some 5,423 hectares and is known as Lot 12, Block O, held under a lease of state land from the Sarawak Government ('the plaintiff's land') while the defendant's parcel measures some 4,964 hectares and is known as Lot 5, held under a provisional lease of state land from the Sarawak Government ('the defendant's land').

Both the plaintiff and the defendant are developing their respective lands for agricultural purposes, planting oil palm as the chosen crop. Geographically, the Balingian Land District lies between the towns of Sibu and Bintulu which is served by a public road which I shall refer to as the Sibu-Bintulu trunk road. The two parcels of land lie to the North-West of this trunk road and are located some 10km off it. In relation to the Sibu-Bintulu trunk road, the position of the two lands to each other is such that the plaintiff's land lies in front of the defendant's land. From the Sibu-Bintulu trunk road. it is possible to get to the plaintiff's land along a former logging road constructed on state land ('the former logging road'). But that road leads only to the boundary of the plaintiff's land; to get to the defendant's land, one must pass through the plaintiff's land using a field road constructed by the plaintiff ('the field road'). It is in respect of the defendant's use of the field road that the injunction is now sought — there is no attempt to stop the defendant's use of the former logging road.

The present dispute arose in this way. The plaintiff began to develop its land earlier than the defendant began theirs. According to the plaintiff, as part of this development it built up the former logging road to connect its land to the Sibu-Bintulu trunk road. The plaintiff also built the field road which ran internally through the plaintiff's land and connected to the boundary of the defendant's land.

Sometime towards the end of 1999, the defendant began to develop its land. According to the defendant, its managing director spoke to one Mr Neil Wong Huo Liang of the plaintiff company regarding the use by the

defendant of the former logging road and the plaintiff's field road to gain access to and from the defendant's land to the Sibu-Bintulu trunk road. In consideration of such use, the defendant was willing to bear half the cost of maintenance of these roads. On 22 November 1999, the defendant wrote a letter to the plaintiff to confirm that conversation and shortly thereafter, the defendant mobilised equipment and began using the said roads. About a month later, on 29 December 1999, the plaintiff wrote to the defendant's managing director saying that the plaintiff had not granted permission for the use of its roads and that with immediate effect further use of the roads were prohibited. Within two days of that letter, a meeting took place between representatives of the plaintiff and the defendant. I say 'representatives' because from the documents exhibited in court relating to the meeting, the plaintiff apparently belongs to a group of companies referred to as the WTK group and the defendant and a company called Woodman Sdn Bhd belong to another group of companies known as the Samling group. Nothing turns on this point because counsel seem to have accepted that during the meeting, a reference to the WTK group included a reference to the plaintiff and a reference to Woodman Sdn Bhd included a reference to the defendant.

At the meeting on 31 December 1999, several matters were discussed but in so far as the dispute herein is concerned, the plaintiff and the defendant seem to have arrived at some form of understanding that the defendant would compensate the plaintiff for road usage at the following rate:

(a) Former logging road of 10km: RM50,000 per mile equivalent to RM310,752.

(b) Native compensation: 50% of cost incurred equivalent to RM56,054.40.

(c) Field road: RM500 per chain for 1st to 5th km. and RM650 per chain for 6th km onwards equivalent to RM182,200.

As far as maintenance of the former logging road and field road was concerned, that would be undertaken by the plaintiff but the defendant would reimburse the plaintiff towards 50% of that cost. The plaintiff could not agree, however, on the amount of compensation for the former logging road and until that question was settled, it is recorded that the defendant was not authorised to use the roads but it seems, did do so. The defendant then wrote to the plaintiff on 5 January 2000 requesting the plaintiff to prepare an agreement on what had been agreed upon. There then followed an exchange of draft agreements between the solicitors for the plaintiff and the defendant during which time, the defendant continued to use the former logging road and the field road as access to their said land. Unfortunately, the commercial terms upon which these two roads were to be used could not be agreed upon. By a letter dated 3 May 2000, the plaintiff wrote to the defendant revoking all previous offers made to the defendant in respect of the use of the aforementioned roads and prohibiting the defendant from making use of any portion thereof.

On that same day, that is 3 May 2000, the defendant by letter referred their problem of access to the Superintendent of Lands and Surveys, Sibu ('the Superintendent'). On 10 June 2000, the plaintiff wrote to the defendant informing them that at the special request of the defendant, they (the defendant) were permitted to use the said roads for a limited period of 30 days on certain conditions set out in the plaintiff's letter. Those conditions included the limitation of lorry weight to ten tons maximum, no transportation of heavy equipment or machinery, no making use of the roads during rainy days and submission of a list of ten lorries with their full particulars. On that same day, the defendant wrote to the plaintiff, in essence renewing its offer to enter into an agreement with the plaintiff for the use of the roads on the terms discussed at the meeting held on 31 December 1999. On 11 May 2000, the plaintiff wrote to the defendant informing them, inter alia, of damage caused to the plaintiff's roads and young oil palm trees as a result of the defendant's use of heavy equipment on these roads. At the end of May 2000, the plaintiff put up a guardhouse on its land but this was knocked down by the defendant.

The defendant then on 5 June 2000 wrote again to the Department of Land & Survey, but this time to the Director in Kuching, informing him of the problems faced by the defendant. Meanwhile, on the ground, when the grace period of 30 days given to the defendant expired on 12 June 2000, and no settlement had been arrived at with the defendant, the plaintiff put a metal pole barrier across the road. I am not able to ascertain from the affidavits whether the barrier was put over the entrance to the former logging road or the field road, but the defendant used a bulldozer to go through that barrier. It was immediately replaced by the plaintiff. On 15 June 2000 the defendant used its equipment to construct a diversion around the plaintiff's guardhouse and metal pole barrier and have since then used that diversion to get onto the former logging road and field road.

In response to the letters from the defendant, the Superintendent called a meeting between the parties at his office on 26 June 2000, when the parties were advised to negotiate further. Following that advice, representatives of the plaintiff and the defendant met again on 30 June 2000 but again there was no resolution to the problem. The defendant submitted its report of that meeting to the Superintendent on 3 July 2000. About two months later, on 4 September 2000, the plaintiff's present solicitors wrote to the defendant informing them that while the plaintiff was prepared to negotiate further on the defendant's use of the former logging road, the plaintiff was not prepared to negotiate any further or allow the defendant to use the plaintiff's field road and that any continued use of that road would constitute trespass for which the plaintiff would seek an injunction against the defendant.

On receipt of the plaintiff's solicitors letter aforementioned, the defendant on 7 September 2000 wrote to the Superintendent requesting, inter alia, that the Superintendent make a stand on the matter and apply the provisions of the Sarawak Land Code. On 26 September 2000, the Superintendent wrote to the defendant stating that the matter was receiving his attention and that the defendant would be informed of the outcome in

due course. In the meantime, on 18 September 2000, the plaintiff had filed this action seeking a declaration that the defendant is not entitled to enter or cross the plaintiff's said land and for an injunction to restrain the defendant from doing so and for damages. On the same day, the plaintiff applied for this interlocutory injunction against the defendant.

The defendant opposes the plaintiff's application and has filed an affidavit setting out why it does so. In essence, it is the defendant's case that its land is landlocked. The only existing reasonable access to its land from the Sibu-Bintulu trunk road is along the former logging road and then through the field road to the defendant's land. In such a situation, the defendant says that it can avail itself ,of the provisions of s 34 of the Sarawak Land Code (Cap 81) ('the Land Code') and claim an implied right of way to pass and repass over the field road with vehicles; the defendant is therefore not to be treated as a trespasser.

In arguments before me, Mr Joseph Tang of counsel for the plaintiff submitted that the plaintiff is entitled to the injunction it seeks even though the effect of doing so would be to practically grant to the plaintiff the whole of its relief at this stage of the proceedings. Mr Tang says that the plaintiff is bound to succeed at the trial of this action because being the registered proprietor of the land on which the field road is built, the plaintiff is able to assert an indefeasible title to the said land which title, by virtue of the provisions of s 132 of the Land Code, is free from all other interests except for those six exceptions mentioned in sub-s (1) of s 132 of the Land Code. In so far as those six exceptions are concerned, Mr Tang submitted that only sub-s (1)(c) was relevant to the present dispute. By that subsection, the registered proprietor of any estate or interest in land holds such interest subject to the implied conditions, obligations and restrictions referred to in s 32 of the Land Code. Section 32(1)(h) of the Land Code in turn provides that in the absence of any express provisions to the contrary in the document of title, there shall be implied in such document of title that the land shall be subject to the rights and conditions more particularly set out in ss 33 to 37 inclusive of the Land Code. Of those sections, only s 34 of the Land Code is relevant to our purposes and reads in its relevant parts:

> Section 34(1) All land shall be held subject to an implied right —
>
> (a) that the proprietor or occupier of land adjoining or in the neighbourhood who has no other reasonable means of access from his land to a public road, way, river creek or foreshore;
>
> (b) …
>
> (c) …
>
> shall have a right of way for all reasonable purposes over such land and to pass and repass with or without boats or vehicles.

When the provisions of s 132 of the Land Code are read in conjunction with ss 32 and 34 of the Land Code, Mr Tang acknowledges that the defendant's claim to an implied right of way to pass and repass over the field road could constitute an exception to the plaintiff's claim to indefeasibility of title, but,

it is Mr Tang's submission that s 34 of the Land Code only confer a 'deferred right' on the defendant. By this, Mr Tang means that anyone claiming an implied right of way under s 34 of the Land Code must first acquire that right in accordance with the provisions of sub-s (2), (3) and (4) of s 34 of the Land Code. Thus, according to Mr Tang, if the person claiming the right of way and the person over whose land that right is claimed cannot agree on the location of the path which will constitute a right of way, sub-s (2) of s 34 of the Land Code provides that the person requiring the right of way shall refer the matter to the Superintendent who will have power to decide. Likewise, by sub-s (3) of s 34 of the Land Code, the Superintendent has power to declare the terms upon which a right of way shall be granted and may impose conditions as to how the right of way is to be formed and maintained; and, where the right of way is granted over an existing path already formed and maintained, the Superintendent may order the claimant of the way to pay compensation to the person over whose land it passes. More important, according to Mr Tang, is the provisions of sub-s (4) of s 34 of the Land Code which provide that where a right of way has been created under s 34 of the Land Code, the Superintendent may issue a right of way certificate which certificate will specify the land served by the right of way and the land over which it exists; the Superintendent may also have endorsed on such certificate a diagram of the land served by the right of way and the land over which it exists and the certificate will be noted on appropriate maps and plans in the Land and Survey Office and registered in the Register.

It is Mr Tang's submission that until the Superintendent has actually issued a right of way certificate in accordance with the provisions of sub-s (4) of s 34 of the Land Code, the defendant cannot claim any implied right of way, and, cannot exercise that implied right to pass and repass. According to Mr Tang, until the Superintendent has issued such a certificate, the defendant is a trespasser and the court will grant an injunction to protect the plaintiff's possessory rights from being continuously infringed.

The defendant does not see the provisions of s 132 and s 34 of the Land Code operating in quite the same way as the plaintiff does. Ms Perpetua Phang of counsel for the defendant submitted that from the evidence now before the court, it is clear that the former logging road and the field road forms the only reasonable access to and from the defendant's land to a public road, that is, the Sibu-Bintulu trunk road. As such, the law, by s 34 of the Land Code, will imply that the defendant has a right of way to pass and repass with or without vehicles over the field road for all reasonable purposes. And, it is the case of the defendant that such a right may be acquired and exercised without the Superintendent having to issue a right of way certificate or of such certificate having to be registered before the implied right is exercised. According to Ms Phang, if the Superintendent issues a right of way certificate under s 34(4) of the Land Code, that certificate is evidence of such right of way and not constitutive of it. In support of her submission. Ms Phang referred to *Land Law* by GW Hinde, DW McMorland and PBA Sim (Vol 2) at p 144 where the learned authors

discuss the five main classes of exceptions to the indefeasibility principle in the following way:

> … the term 'Indefeasibility of title' is a misnomer. A registered proprietor is not protected against every kind of adverse claim, and it cannot be assumed that he holds his estate or interest free from all 'encumbrances, liens, estates, or interests' except those which are noted on the register.
>
> The exceptions to the indefeasibility rule fall into five main categories. First, a number of departures from the principle of indefeasibility of title are made in the Land Transfer Act 1952 itself. Secondly, a variety of statutes either expressly or impliedly override the Land Transfer Act 1952 thus affecting registered titles often without any entry being made on the register. Thirdly, …

Ms Phang also referred to p 187 of the same publication where the authors discuss statutory rights which may override land transfer titles in New Zealand:

> The mere fact that a statute creating rights over land provides for the registration of those rights under the Land Transfer Act does not necessarily mean that those statutory rights will only affect the land if and when they are registered. Registration may merely be, to use the words of Salmond J 'evidentiary of. … legal title, but not constitutive of it. Thus in *The King v Walariki District Maori Land Board*, the Court of Appeal decided, inter alia, that an unregistered partition order of Maori land which was under the Land Transfer Act affects the legal estate even before registration.

Ms Phang accordingly submitted that the plaintiff's contention that its rights over the field road are protected against the defendant's claim to an implied right of way until the Superintendent had issued a right of way certificate and registered the same untenable because the provisions relating to indefeasibility of title housed in s 132 of the Land Code has itself expressly made the implied right of way mentioned in s 34 an exception to the indefeasibllty rule. And although the defendant had referred the matter to the Superintendent, and right of way certificate has yet been issued by the Superintendent, according to Ms Phang, the right of way implied by s 34(1) of the Land Code nevertheless prevails over the register and may be exercised independent of the issue of the certificate. Ms Phang accordingly submitted that the plaintiff's claim against the defendant for trespass was a frivolous and vexatious one; the plaintiff did not have a valid cause of action and therefore the plaintiff's application for interlocutory injunction did not disclose a serious issue that required to be tried and must therefore be dismissed.

Before considering the question whether or not the plaintiff's application discloses a serious question to be tried, there is a matter raised in submissions that I should deal with here. While the defendant claims that its only reasonable access to the Sibu-Bintulu trunk road is by the former logging road and the field road, this fact is disputed by the plaintiff. The plaintiff has through Mr Tan Ah Kow's affidavit of 28 September 2000 averred that the defendant was offered a strip of land along the border of the plaintiff's land for the construction of an access road to the defendant's land

but the offer was rejected. The plaintiff accordingly says that the defendant is seeking a convenient way out of its problem because it will take time and expense to construct a road along the border of the plaintiff's land. The plaintiff nevertheless avers that the offer to the defendant still stands. With that, I now turn to consider whether the plaintiff's application discloses a serious issue to be tried.

Having considered the pleadings, the evidence disclosed by the affidavits and the submissions of counsel on the facts and the law applicable to those facts, I find that the plaintiff's allegation that the defendant is a trespasser is not a frivolous or a vexatious one as alleged by the defendant. In my judgment, the question whether the defendant is to be regarded as a trespasser raises bona fide serious issues that require to be tried. I say so because whether the right of way implied by s 34(1) of the Land Code prevails over the register so that persons such as the defendant may avail themselves of that right and exercise the implied right to pass and repass over the land of another before a right of way certificate is issued by the Superintendent pursuant to s 34(4) of the Land Code, or alternatively, whether the right of way implied by s 34(1) of the Land Code only confers upon persons such as the defendant, a deferred or qualified or conditional right which can only be acquired and exercised after application to and issuance by the Superintendent of a right of way certificate, pose difficult questions of law which can only be decided after properly considering and interpreting the relevant provisions of s 132 and s 34 of the Land Code and the application of the principles of indefeasibility of title as discussed in the various authorities referred to by counsel in the context of the Land Code.

I have set out in some detail earlier, the submissions made by counsel for the plaintiff as well as the defendant in support of their respective cases and it does seem to me that the entitlement of the plaintiff to the relief sought or conversely, the success of the defendant's opposition to it, both depend upon each making good the proposition of law advanced by them and identified above by me. The submission of Mr Tang to the effect that the right of way implied by statute under s 34 of the Land Code can only be exercised upon a right of way certificate being issued and registered by the Superintendent certainly has the merit of logic and reason behind it and a fair chance of success at the hearing because, if, as claimed by the defendant the implied right of way over the land of another may be exercised even before the Superintendent issues a right of way certificate under s 34 of the Land Code, then why in the first place have the elaborate provisions of s 34 of the Land Code? Having said that, however, the submission of Ms Phang is not without merits of its own because when sub-s (4) of s 34 of the Land Code is looked at, it states that where a right of way has been created under the provisions of that section, 'the Superintendent may issue a right of way certificate which shall …' Now, the words 'may issue' seem to suggest that the issuance of a right of way certificate is a matter at the discretion of the Superintendent and that a right of way can be created or come into existence without there having to be a certificate issued by the Superintendent. In the light of the authorities cited by Ms Phang, the defendant's proposition is sufficiently arguable and with a fair chance of

success at the hearing too. However, the law is that it is not the function of the court at this stage of the proceedings to decide on these difficult propositions of law and neither is it open to me, at this stage of the proceedings, to prefer the interpretation put by the plaintiff on ss 132 and 34 of the Land Code over that put on them by the defendant; these are matters which call for detailed arguments and mature consideration which are best dealt with at the trial. See *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193.

Apart from the issues identified above, there is also another matter upon which a serious question has arisen. it is whether the afield road is the only reasonable access for the defendant to the Sibu-Bintulu trunk road. The plaintiff denies it to be so and has given its reasons for saying so but whether it is or not is essentially a question of fact which is unsuitable for determination here because the evidence before the court at this stage of the proceedings is incomplete and given on affidavit and untested by cross-examination. Besides that, counsel for the plaintiff has submitted that the court should not even enter into an investigation on this question because it is a matter which the legislature intended should be decided by the Superintendent according to the provisions of s 34 of the Land Code. Without expressing any view on Mr Tang's submission, it at least shows that the question is unsuitable for determination here.

Having found that the plaintiff's application does disclose serious questions to be tried, I now move on to consider whether the justice of the case calls for the grant or refusal of the injunction sought. In doing so, I first consider whether if the plaintiff were to succeed at the trial in establishing its right to a permanent injunction, it would be adequately compensated by an award in damages for the loss it would have sustained as a result of the defendant's continued use of the field road? The plaintiff complains that the defendant's use of the field road is causing damage to it as well as to young oil palm trees planted. The plaintiff also complains that damage was done to the plaintiff's guardhouse and metal pole barrier. In my view, these are all items of loss or damage for which the plaintiff can be adequately compensated by way of damages. In fact, it is to be noted that during the negotiations held on 31 December 1999, the plaintiff had agreed to be paid RM500 per chain for the first to fifth km and RM650 for sixth km onwards or RM182,200 as compensation for the defendant's use of the field road. That to me was a clear indication that the plaintiff did regard the conceding of rights of usage of the field road as a matter compensatable in monetary terms and would serve as a useful guide in the award of damages should it be found at the trial that the defendant is a trespasser. The defendant has in the affidavit of Law Kui Kiong affirmed on 26 September 2000 stated that it owns its land which is free from all encumbrances; has paid a premium of RM2.482m for their land and spent a large amount of money in improving their land. According to Mr Law, the land is worth a few million ringgit now and the defendant is in a position to pay any compensation which may be ordered by this court. I have no reason to doubt this ability of the defendant which has gone completely unchallenged by the plaintiff.

I next consider whether on the contrary hypothesis that the defendant were to succeed in establishing at the trial that it had every right to exercise its implied right to pass and repass on the field road but had been prevented from so doing, it would be adequately compensated under the plaintiff's undertaking in damages. The evidence disclosed in the affidavit of Law Kui Kiong affirmed on 26 September 2000 on behalf of the defendant shows that:

(a) the defendant had commenced development of its land sometime in late November 1999 with land clearing works;

(b) an oil palm nursery was established on the defendant's land in March 2000 in readiness to receive oil palm seeds which had been ordered before March 2000 from suppliers in West Malaysia for delivery to Sarawak in batches;

(c) the seeds which are scheduled to arrive every month until December are required to be planted into bags within three days from arrival of the seeds;

(d) the seeds take about ten to twelve months to grow into seedlings whenafter they must be transplanted in the field. Any delay in transplanting would result in stunted growth which in turn affects the yield of such oil palms. If delay is prolonged, transplanting may become impossible;

(e) the time-table and program of the defendant in the development of its oil palm plantation is set in a manner to achieve field planting on or before November 2001 and to achieve full planting of the nett plantable area of the defendant's land by November 2004;

(f) the provisional lease granted to the defendant by the government stipulate conditions which require the defendant to achieve full planting of the nett plantable area of the defendant's land within five years of November 1999, ie November 2004 and a breach of that condition would render the defendant's land liable to forfeiture by the government;

(g) there are some 120 workers employed on the defendant's land some of whom have their families with them. These 'workers are also housed on the defendant's land in quarters constructed for them. Transportation of food supplies and other necessities such as oil, fuel and medical supplies to these workers are required using the field road;

(h) the defendant has paid land premium of some RM2,482,000 and spent other monies on the clearing of the land and readying the same for planting.

On the facts outlined above, it is my view that the defendant would not be adequately compensated in damages for the loss it would have sustained by being prevented from using the field road between now and the trial because any disruption to the defendant's present activities, schedule and time-table would cause irreparable damage for the reasons given by the defendant and

with which I fully agree. The reasons were: first, any seeds arriving would need to be transported to the defendant's land and if not planted would be damaged; seeds already growing would mature and need to be transplanted around December 2000 or January 2001 as the first batch of nursery was started in March. To enable transplanting to proceed, the land has to be prepared and this requires time and workers. Secondly, if the defendant were denied access to its land so that development works as well as food and other essential supplies are halted or disrupted, the workers would have to be retrenched. Thirdly, without workers, the oil palm plantation would be abandoned and the loss of potential profit would be difficult to assess at this time as this would depend on the time taken for the oil palm to mature to fruiting stage and the price of oil palm fresh fruit bunches then. Fourthly, the failure to proceed with field planting by November 2001 and full planting by November 2004 would expose the defendant's land to forfeiture.

It is not difficult to see from the facts disclosed that the practical realities of the case are that the defendant has begun to develop its oil palm plantation and had been doing so since November 1999. The plaintiff being plantation owners as well, must know that such large scale development works are executed according to a schedule and involve long term planning and large financial outlays. Once these works are started and labour and equipment mobilized, the activities are not such that they can be started today and stopped tomorrow. Thus, if the injunction sought is granted, the entire development operations on the defendant's land would come to a halt with the results described above. The hardship caused thereby would not only be felt by the defendant but also by its workers and their families. On the other hand, if the injunction were refused, what the plaintiff suffers is the physical damage complained of tolls property which, as I have said, can be compensated in damages; but the business activities on the plaintiff's land is not hindered and would continue unabated. Thus, the harm that the injunction would produce by its grant far outweighs, in my view, the harm that would result from its refusal.

It was argued on behalf of the plaintiff that any damage the defendant may complain of is self-induced and therefore the court should refuse them any assistance. I do not see that as being the case. The facts indicate that initially, the defendant probably felt they could come to some form of arrangement with the plaintiff over their use of the former logging road and the field road which explains their initial use of these roads, and, it appears their belief was not without basis because the parties did enter into serious discussions on 31 December 1999 and had come to some understanding over the use of both roads. Unfortunately, the commercial terms of that understanding could not be agreed upon, but that impasse took some time to arrive at so that by May 2000 when the plaintiff finally prohibited the defendant from using both roads, the defendant had by then been doing so for some six to seven months. It cannot therefore be said that the defendant is solely to blame for the difficulty it now finds itself in. The position would be different if the plaintiff had from the very beginning taken the stand that the former logging road and the field road were not available for use by the

defendant at all and had taken steps to prevent their use by the defendant who, nevertheless, persisted to use those roads. But by the facts shown that was not the case. Having said that, I do not agree with the submission of counsel for the defendant that the conduct of the plaintiff has been such that the doctrine of estoppel would operate to bar the plaintiff from coming to court to seek the relief it does. It should not be overlooked that the plaintiff first entered into negotiations with the defendant over these roads at the request of the defendant and did not do anything to encourage the defendant's use of the former logging road and field road. In fact, the letters written by the plaintiff show that it had been careful to reserve its position although it did not do anything to enforce its rights until the very end. I do not therefore think that the plaintiff can be accused of unconscionable conduct.

It was also submitted by counsel for the defendant that the plaintiff had been guilty of delay in coming to court to seek their remedy. I do not think this is so. The facts show that beginning from November 1999, there had always been some form of negotiation or contact between the parties about the use of the roads; that went on until the end of June 2000 when the Superintendent called a meeting. Until then, it would in my view, be quite wrong for the plaintiff to come running to court while some form of talks were still ongoing. It was really only by August 2000 that there was nothing further to be said between the parties. By September 2000 the plaintiff had come to court. I do not regard the plaintiff as having delayed in so coming to court.

There is a matter which I finally wish to take into account in considering the justice of this case. In *American Cyanamid*'s case, Lord Diplock indicated that when considering where the balance of convenience lies in a case, there may be some other special factors to be taken into consideration in the particular circumstances of individual cases. I believe this is such a case. As discussed earlier, s 34(2), (3), (4), (5) and (6) of the Land Code confers on the Superintendent, power to decide on a right of way and the terms upon which that right of way may be granted. Now, it will be recalled that when matters between the plaintiff and the defendant became difficult, the defendant wrote two letters to the Superintendent in which the defendant made known its problem to the Superintendent. The two letters from the defendant are dated 3 July 2000 and 7 September 2000 respectively. They were written by a layman. One letter requests the Superintendent to take a stand on the matter and to set standard terms and conditions for the road usage. The other letter requests the Superintendent to apply the provisions of the Land Code as the negotiations between the plaintiff and the defendant produced no result. I am satisfied that by these letters the defendant had made a request that the Superintendent exercise the powers vested in him by s 34 of the Land Code and that the Superintendent had by his reply of 26 September 2000 to the defendant, which states that the matter is receiving his attention and that the defendant will be informed of the outcome in due course, acted on that request. It would accordingly be inappropriate that while the matter is still under consideration by the Superintendent, I should grant an injunction to the

plaintiff. It may result in a situation where the Superintendent decides to issue a right of way certificate but the defendant is prevented from using such right of way because of the injunction granted by this court. Such a situation is to be avoided.

The above are the matters which I have taken into account in considering where the justice of this case lies. On weighing them as a whole, I find that they do not call for a grant of the injunction sought. This does not mean that I condone the conduct of the defendant in damaging the plaintiff's guardhouse and pole barrier. The acts are deplorable. However, when taken into the weighing, they were insufficient to tip the balance in favour of the plaintiff. For the reasons given above, I refuse the plaintiff's application with costs to the defendant.

Application dismissed.

Reported by Moy Saw Han